

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH RIACHI,

Plaintiff-Appellee,

v

CITY OF DETROIT

Defendant-Appellant,

and

DETROIT FIRE DEPARTMENT,

Defendant.

UNPUBLISHED

April 4, 2006

No. 258940

Wayne Circuit Court

LC No. 04-419320-CZ

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant City of Detroit¹ appeals as of right from the trial court's denial of its motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity. We reverse and remand for entry of summary disposition in favor of defendant. This case is being decided without oral argument under MCR 7.214(E).

Defendant argues that governmental immunity applies in this case because defendant was engaged in a governmental function, and immunity shields defendant from liability in tort. Defendant asserts it was not engaged in one of the five statutory exceptions to immunity. Defendant also contends the trial court was in error to suggest that defendant could face liability on the basis of gross negligence. We agree.

We review the grant or denial of a motion for summary disposition de novo. *Mitan v Campbell*, 474 Mich 21, 23; 706 NW2d 420 (2005). When we review a motion for summary disposition based on governmental immunity under MCR 2.116(C)(7), we consider evidentiary

¹ The term "defendant" throughout this report refers to the City of Detroit and not the Detroit Fire Department, which is not a party to the appeal.

support such as affidavits, depositions, and admissions, in addition to the pleadings, to determine whether the claim is barred by immunity. *Id.*; MCR 2.116(G)(5). Such documentary evidence shall only be considered to the extent it would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); MCR 2.116(G)(6). A complaint's contents are accepted as true unless otherwise contradicted by the defendant. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). To defeat a motion for summary disposition based on governmental immunity, plaintiff must allege facts justifying the application of an exception to governmental immunity. *Johnson v Wayne Co*, 213 Mich App 143, 158; 540 NW2d 66 (1995).

Plaintiff alleges in her complaint that from 1998 to 1999, she informed defendant on numerous occasions that a fire hydrant in front of her house was inoperative. Plaintiff further alleges that one of defendant's employees informed her that the fire hydrant was fixed after she had made repeated phone calls to complain regarding the fire hydrant. In 2002, when plaintiff's home caught fire, fire fighters were unable to save her home because the fire hydrant was still inoperative. Plaintiff brought suit against defendant claiming gross negligence, fraud and misrepresentation. Defendant moved for summary disposition based in relevant part on governmental immunity. The trial court denied that motion and indicated that plaintiff stated a cause of action at least on the basis of gross negligence.

We hold that the trial court erred in denying summary disposition to defendant on the basis of governmental immunity. Governmental agencies are immune from tort liability as long as the agency was engaged in a governmental function or unless otherwise provided by the governmental immunity act. MCL 691.1407(1). Governmental agencies include political subdivisions. MCL 691.1401(d). Political subdivisions include municipal corporations, MCL 691.1401(b), and a city is a municipal corporation. MCL 691.1401(a). Consequently, defendant is entitled to statutory governmental immunity if it was engaged in a governmental function, except as otherwise provided in the act. *Stevenson v Detroit*, 264 Mich App 37, 41; 689 NW2d 239 (2004).

The five narrowly drawn statutory exceptions to the broad grant of immunity are the highway exception, motor vehicle exception, public hearing exception, proprietary function exception, and the governmental hospital exception. *McDowell v Detroit*, 264 Mich App 337, 356; 690 NW2d 513 (2004). Since plaintiff did not allege that any of these exceptions apply, the only issue to resolve is whether defendant was engaged in a governmental function. We conclude that defendant was engaged in such a function.

A governmental function encompasses all activities expressly or impliedly mandated or authorized by constitution, statute, or other law. *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002). We construe the term governmental function broadly. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003). Even an improperly performed activity is still an authorized governmental function, if the general activity was authorized by law. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), overruled on other grounds by *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143; 560 NW2d 50 (1997). We focus on the general activity rather than any specific conduct involved at the time of the alleged tort. *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004). While plaintiff contends that fraudulently misrepresenting the status of a fire hydrant is not a governmental activity, we note that the general activity engaged in by defendant at the time was

the operation and maintenance of fire hydrants, which is a governmental function. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 487; 532 NW2d 183 (1994).

Plaintiff argues that governmental functions should not encompass activities done by governmental agencies to achieve a goal illegally that it could not achieve legally. Plaintiff cites Justice Brickley's concurring opinion in *Smith v Dep't of Public Health*, 428 Mich 540, 611; 410 NW2d 749 (1987) (Brickley, J., concurring), affirmed sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989), for the proposition that "the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law is not the exercise of a governmental function." That precise language was later adopted by this Court in *Gracey* in finding an "intentional-tort exception to governmental immunity for *the intentional use or misuse of a badge of governmental authority for a purpose unauthorized by law.*" *Gracey*, *supra* at 418 (emphasis added). But the Michigan Supreme Court expressly overruled *Gracey* on that point in *American Transmissions*. *American Transmissions*, *supra* at 143. Regardless of a governmental agency's improper motive, the Court in *American Transmissions* clearly held that "the Legislature has provided no such [exception]" to governmental immunity. *Id.* Even if defendant or one of its employees had an improper intent to stop plaintiff from complaining about the fire hydrant, such improper motive provides no exception to the broad grant of governmental immunity. Moreover, fraud and misrepresentation are intentional torts, *Huron Tool & Engineering Co v Precision Consulting Services*, 209 Mich App 365, 368; 532 NW2d 541 (1995), and there is no intentional tort exception to the broad grant of governmental immunity, *Smith*, *supra* at 544. Defendant is entitled to statutory governmental immunity.

We further note that the trial court erred in its assumption that defendant may be liable on the basis of gross negligence. The exception to governmental immunity predicated on gross negligence applies solely to government employees and not to governmental agencies themselves. *Gracey*, *supra* at 420-421. Plaintiff also contends that defendant's actions were a violation of the Michigan Constitution, to the extent that they denied plaintiff's right to seek redress for her grievances. However, only the state, not municipalities, may be sued for damages based upon an alleged violation of the Michigan Constitution. *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000).

We reverse the trial court's denial of summary disposition on the basis of governmental immunity and remand this case to the trial court for entry of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra